

**REMARKS**

In response to the Official Action mailed December 26, 2007, Applicant submits the following amendments and remarks. Claims 1-26 and 28-32 were pending. Claims 1, 25 and 30 have been amended.

**REJECTION - 35 U.S.C. §112**

Claims 1-26 and 28-32 are rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement. All the dependent claims are rejected for containing new matter through inheritance. Without admitting to existence of new matter in any claim, independent claims 1, 25 and 30 have been amended to exclude what the Examiner deems to be new matter in order to obviate the rejection and as such features are not needed to define over the prior art. Applicant urges that the amended claims 1, 25 and 30 overcome the rejection under 35 U.S.C. §112, first paragraph and are allowable. Claims 2-24, 26, 28-29 and 31-32 depend from claims 1, 25 and 30 respectively and are also allowable by virtue of amendments to the independent claims.

**REJECTION - 35 U.S.C. §103**

Claims 1, 2, 5-7 and 9-26 are rejected under 35 U.S.C. §103(a) as being obvious over U.S. Patent Publication 2002/0143328 to Schluzas, et al., in view of U.S. Patent No. 5,964,761 to Kambin and further evidenced by U.S. Patent Publication 2003/0045878 to Petit et al. In response to this rejection, Applicant has amended claims 1, 25 and 30.

Amended claim 1 recites

"a sliding element having a top portion and a base portion, . . . and said base portion having a convex surface;

. . .

a stopping element having a concave surface engageable with said convex surface of said sliding element base portion such that the stopping element can rotate about said convex surface of the base portion thereby allowing the bone fastener to be positioned and locked in the sliding element aperture at a plurality of different angles . . . ."

The Examiner acknowledges that *Schluzas* does not disclose a stopping element separable and adjustable as included within the claims of the present application. To make up for this deficiency, the Examiner cites Kambin and Petit et al. Neither Kambin nor Petit et al. teach disclose or suggest a stopping element that not only allows height adjustment of the screw but also allows "the bone fastener to be positioned and locked in the sliding element aperture at a plurality of different angles," as recited in claim 1. Thus, *Schluzas* in view of Kambin and further evidenced by Petit et al. fails to teach disclose or suggest all elements of claim 1. Therefore, claim 1 is not obvious over *Schluzas* in view of Kambin and further evidenced by Petit et al.

Claims 2, 5-7 and 9-24 depend from claim 1 either directly or indirectly and are not obvious over *Schluzas* in view of Kambin and further evidenced by Petit et al. at least for the same reasons as claim 1 but also by reason of the additional features shown therein which are not shown in the prior art.

Amended claim 25, in part recites

"an insert slidable in said elongate opening, said insert having . . . a base portion having a second spherical surface . . . said second spherical surface facing the bone;

. . .

a positioning means for positioning a height of said bone plate relative to a vertebral body, . . . said positioning means having a third spherical surface facing away from the bone, said third spherical surface being adapted to rotatably engage the second spherical surface thereby allowing the bone fastener to be positioned and locked in the insert at a plurality of different angles."

The Examiner has treated "a positioning means" as a stopping element. Therefore, examiner's statements with respect to the stopping element apply equally to the "positioning element." The Examiner has acknowledged that Schluzas does not disclose "a positioning means" separable and adjustable as included within the claims of the present application. To make up for this deficiency, the Examiner cites Kambin and Petit et al. Neither Kambin nor Petit et al. teach disclose or suggest a positioning means that not only allows height adjustment of the screw but also allows "the bone fastener to be positioned and locked in the insert at a plurality of different angles " as recited in claim 25. Thus, Schluzas in view of Kambin and further evidenced by Petit et al. fails to teach disclose or suggest all elements of claim 25. Therefore, claim 25 is not obvious over Schluzas in view of Kambin and further evidenced by Petit et al.

Claims 26, 28-29 depend from claim 25 either directly or indirectly and are not obvious over Schluzas in view of Kambin and further evidenced by Petit et al. at least for the same reasons as claim 25 but also by reason of the additional features therein which are not shown in the prior art.

Amended claim 30, in part, recites

"engaging a positioner onto said bone fastener, said positioner having an engagement element that allows said positioner to engage said bone

fastener and translate along the longitudinal axis of the bone fastener said positioner being adapted to rotatably engage the second spherical surface thereby allowing the positioner and the bone fastener to be positioned and locked in the insert at a plurality of different angles."

The Examiner has treated "a positioner" as a stopping element. Therefore, Examiner's statements with respect to the stopping element apply equally to the "positioner." The Examiner has acknowledged that *Schluzas* does not disclose "a positioner" separable and adjustable as included within the claims of the present application. To make up for this deficiency, the Examiner cites *Kambin* and *Petit et al.* Neither *Kambin* nor *Petit et al.* teach, disclose or suggest a positioner that not only allows height adjustment of the screw but also allows "the positioner and the bone fastener to be positioned and locked in the insert at a plurality of different angles." as recited in claim 30. Thus, *Schluzas* in view of *Kambin* and further evidenced by *Petit et al.* fails to teach disclose or suggest all steps of claim 30. Therefore, claim 30 is not obvious over *Schluzas* in view of *Kambin* and further evidenced by *Petit et al.*

Claims 31-32 depend from claim 30 and are not obvious over *Schluzas* in view of *Kambin* and further evidenced by *Petit et al.* at least for the same reasons as claim 30 but also by reason of the additional features therein that are not shown in the prior art.

Claims 3, 4 and 8 are rejected under 35 U.S.C. §103(a) as being obvious over *Schluzas, et al.*, in view of U.S. Patent No. 5,964,761 to *Kambin* and further evidenced by *Petit et al.*, and further in view of U.S. Patent No. 5,613,968 to *Lin*. The Examiner cites *Lin* only for the teachings related to "a plurality of fingers" recited in claim 3. However, claim 3 depends from claim 1 and therefore includes all limitations of

claim 1. But *Schluzas* in view of Kambin and further evidenced by *Petit et al.* does not teach disclose or suggest all elements of claim 1 as discussed above. And, *Lin's* teachings related to the "plurality of fingers" does not make up the deficiency of *Schluzas, et al.*, in view of Kambin and further evidenced by *Petit et al.* Therefore, *Schluzas, et al.*, in view of Kambin and further evidenced by *Petit et al.* and further in view of *Lin* cannot teach disclose or suggest all elements of claim 3. Therefore, claim 3 is not obvious over *Schluzas, et al.*, in view of Kambin and further evidenced by *Petit et al.*, and further in view of *Lin*.

Claims 4 and 8 depend from claim 3 and are not obvious for at least the same reasons as claim 3 but also by reason of the additional features therein that are not shown in the prior art.

As it is believed that all of the rejections set forth in the Official Action have been fully met, favorable reconsideration and allowance of claims 1-26, 28-32 is earnestly solicited.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicant's attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

Application No.: 10/806,736

Docket No.: SPINE 3.0-423

If there are any additional charges in connection with this requested Amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: September 22, 2008

Respectfully submitted,

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